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THEODORE H. KATZ
US MAGISTRATE JUDGE

August 25, 2009

BY HAND DELIVERY

The Honorable Theodore H. Katz
United States Magistrate Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Anwar v. Fairfield Greenwich Group*, Master File No. 09 CV 0118 (VM);
Ferber SEP IRA v. Fairfield Greenwich Group, 09 CV 2366 (VM);
Pierce v. Fairfield Greenwich Group, 09 CV 2588 (VM);
Morning Mist Holdings Limited v. Fairfield Greenwich Group, 09 CV 5012 (VM)

Anwar et al v. Fairfield Greenwich Limited et al Doc. 238

Dear Judge Katz:

We represent plaintiffs in the Derivative Actions, and write to request a pre-motion conference concerning a discovery dispute with defendants Fairfield Greenwich Advisors LLC and Fairfield Greenwich (Bermuda) Ltd. (collectively, "Fairfield"). We have conferred with Fairfield's counsel but have been unable to resolve this matter.[1]

The dispute concerns plaintiffs' request for documents that Fairfield produced in an action brought by the Massachusetts Securities Division entitled *In the Matter of Fairfield Greenwich Advisors LLC and Fairfield Greenwich (Bermuda) Ltd.*, No. 2009-0028 ("Massachusetts Action"). That action alleges that Fairfield breached fiduciary duties in connection with investments with Bernard L. Madoff Investment Securities LLC. By this request, we seek copies only of documents produced by Fairfield in that action.

Fairfield refuses to produce the documents, claiming that the discovery request is premature. Fairfield is mistaken, as shown below.

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[1] Motions to remand the Derivative Actions (*Ferber*, *Pierce* and *Morning Mist*) are *sub judice.*

1. Derivative Plaintiffs' Request is Timely

Fairfield relies upon Your Honor's June 15, 2009 Order (Dkt. 169). In that Order, the Court endorsed a letter from one of the securities class action plaintiffs' counsel, Steven Toll, stating:

> The Court has been advised that the parties have agreed that a Second Amended Complaint will not be filed until the lead counsel issue is decided. Once the Second Amended Complaint has been filed, the parties shall brief the stay issue.

Id. at 3.[2] Mr. Toll's letter concerned a lead counsel motion under the Private Securities Litigation Reform Act ("PSLRA"), which did not involve the Derivative Plaintiffs or their counsel. Nor are the Derivative Plaintiffs parties to any agreement regarding the filing of the amended complaint.

Future briefing on the stay issue in the securities actions does not entitle Fairfield to a present stay of discovery in the Derivative Actions. In all events, as shown below, the PSLRA stay does not apply to the Derivative Actions.

2. The PSLRA Stay is Inapplicable to the Derivative Actions

The PSLRA discovery stay provision, 15 U.S.C. § 78u-4(b)(3)(B),[3] is inapplicable to the Derivative Actions for the following reasons:

First, these Derivative Actions are *not* subject to the PSLRA. *In re FirstEnergy S'holder Derivative Litig.*, 219 F.R.D. 584, 586-87 (N.D. Ohio 2004) (PSLRA stay inapplicable to derivative cases, even if they "share facts in common with securities fraud cases") (citing *Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162, 167 (S.D.N.Y. 2001)).[4]

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[2] *See also* Dkt. 157 at 2 (statement by various counsel, not including Derivative Counsel: "The parties propose, subject to approval by this Court, to make contemporaneous letter-brief submissions to the Court within seven business days from the filing of the [Second Consolidated Amended Complaint] setting forth their positions with respect to the [PSLRA discovery] stay ....").

[3] Section 78u-4(b)(3)(B) states:

> In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

Second, the fact that the PSLRA stay may apply to the *Anwar* securities class action is of no consequence here. *See FirstEnergy*, 219 F.R.D. at 586 ("The PSLRA, by its terms, is limited to actions filed under the federal securities laws and does not apply outside this context."); *Tyco*, 2003 WL 23830479, at *3. Derivative Plaintiffs' counsel are *not* counsel in the securities class actions, and the documents can be treated as confidential so that they will not be used by the securities plaintiffs to amend their complaint. *See FirstEnergy*, 219 F.R.D. at 586; *Tyco,* 2003 WL 23830479, at *3. Moreover, given that the *Anwar* class plaintiffs plan to file a Second Consolidated Amended Complaint on September 25, 2009 and defendants will then have 45 days to file motions to dismiss that complaint,[5] briefing on those motions likely will not conclude until next year. The Derivative Plaintiffs should not be required to wait any longer to get copies of documents that Fairfield has already produced in the Massachusetts Action.

Third, the PSLRA stay provision, even where otherwise applicable, is properly lifted "where there is a likelihood of undue prejudice." *Sedona Corp. v. Ladenburg Thalmann*, No. 03 CV 3120, 2005 WL 2647945, at *4 (S.D.N.Y. Oct. 14, 2005) (Katz, J.). Recent events demonstrate that a stay would unduly prejudice the Derivative Plaintiffs. Specifically, Fairfield has "repeatedly offered to settle" the Massachusetts Action and is "also involved in settlement discussions with Irving Picard, the SIPC Trustee who brought suit against the Sentry Funds." *See* Fairfield's 8/12/09 "Pre-Hearing Memorandum" in Massachusetts Action, at 1, 4 (annexed without exhibits as Exhibit 1 hereto). Fairfield's settlement discussions with other parties warrants immediate production in these Derivative Actions of the previously-produced documents, particularly given what Fairfield has termed its "limited pool of resources." *Id.* at 4. *See In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 305-06 (S.D.N.Y. 2002); *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 183 (S.D.N.Y. 2004).

Fourth, Fairfield has represented that it "consent[s] to the factual allegations" in the Massachusetts Action's Complaint and "will not contest the allegations set forth in the

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[4] *See also In re Tyco Int'l, Ltd. Multidistrict Litig.*, MDL 02-1335, 2003 WL 23830479, at *3 (D.N.H. Jan. 29, 2003) ("I will not stay discovery in the ERISA and Derivative Actions merely because they have been consolidated with the Securities Actions for pretrial purposes"); *see generally In re Refco, Inc. Sec. Litig.*, No. 05 CV 8626, 2006 WL 2337212, at *2 (S.D.N.Y. Aug. 8, 2006) (Lynch, J.) (discovery stay "does not apply to … non-PSLRA actions. The discrepancy between PSLRA actions and other actions … is evidence of Congress's judgment that PSLRA actions should be treated differently than other actions. This Court may not second-guess that judgment.").

[5] *See* Dkt. 168 ¶ 2; Dkt. 217; 8/24/09 Letter of David A. Barrett to Judge Katz, at 1.

Complaint." Exh. 1 at 5. Those representations further justify the discovery, and dispel any possibility that plaintiffs are engaged in an unnecessary discovery exercise.

Accordingly, Derivative Plaintiffs respectfully request that the Court set a pre-motion conference, or alternatively, direct Fairfield to produce the requested documents.

Respectfully,

Robert A. Wallner

cc: Counsel on attached Service List

The issue of discovery in the derivative actions will be addressed after the remand motions are decided.

SO ORDERED

9/16/09

THEODORE H. KATZ
UNITED STATES MAGISTRATE JUDGE